

Title 22
Libraries, Arts and Antiquities
Chapter 3
Antiquities
Part 9
Repatriation of Human Remains and Funerary Objects

22-3-901. Short title. This part may be cited as the "Montana Repatriation Act".
History: En. Sec. 1, Ch. 558, L. 2001.

22-3-902. Legislative findings and intent. (1) The legislature of the state of Montana finds that:

(a) since July 1, 1991, and passage of the Human Skeletal Remains and Burial Site Protection Act, Montana law has provided a mechanism to protect marked, unmarked, unrecorded, registered, or unregistered graves or burial grounds discovered on state and private land from pilferage, disturbance, and destruction in an effort to provide equal protection and respect for all burial sites, human skeletal remains, and funerary objects;

(b) despite the state's success in balancing the interests of those persons who have tribal, kinship, cultural, or religious affiliation with a burial site with the interests of scientists, agencies, law enforcement, and private landowners, the 1991 Human Skeletal Remains and Burial Site Protection Act did not provide a mechanism to repatriate culturally affiliated human skeletal remains or funerary objects that were taken from burial sites prior to July 1, 1991;

(c) funerary objects interred with culturally affiliated human skeletal remains are not abandoned when interred. Discoverers, therefore, have no right of ownership, and they cannot confer a right of ownership to another because the person who interred funerary objects with the deceased did not through interment abandon a property interest in the objects, but intended for those objects to remain with the deceased.

(d) the state of Montana has an obligation to avoid infringing upon the right to religious beliefs and practices guaranteed to all citizens under the free exercise clause of the first amendment of the United States constitution and under Article II, section 4, of the Montana constitution and to preserve the cultural integrity of American Indian citizens recognized by the state under Article X, section 1(2), of the Montana constitution;

(e) the state of Montana acknowledges the paramount privacy right of a tribal group, lineal descendant, next of kin, agency, or museum to protect sensitive and sacred information that may be required to be disclosed to demonstrate cultural affiliation or lineal descent and therefore authorizes the protection of that information to the full extent allowed by the Montana constitution; and

(f) the state of Montana acknowledges the right of an agency, museum, or person to maintain possession or control of human skeletal remains or funerary objects that are currently under scientific study or that require testing prior to the effective date of the board's determination regarding repatriation.

(2) It is the intent of the legislature to:

(a) provide a consistent state policy to ensure that all human skeletal remains and all funerary objects interred with those human skeletal remains be treated with dignity and respect;

(b) encourage voluntary disclosure and repatriation of culturally affiliated human skeletal remains and funerary objects by an agency, museum, or person;

(c) provide a mechanism to provide for repatriation of human skeletal remains and funerary objects to a tribal group, lineal descendant, or next of kin establishing cultural affiliation with those human skeletal remains or funerary objects that were taken from unprotected burial sites prior to July 1, 1991, and that are currently in the possession or control of an agency, museum, or person in this state; and

(d) protect the right of privacy guaranteed to tribal groups, lineal descendants, next of kin, agencies, or museums regarding the disclosure of sacred or religious information to the full extent allowed by the Montana constitution.

History: En. Sec. 2, Ch. 558, L. 2001.

22-3-903. Definitions. As used in this part, the following definitions apply:

(1) "Agency" means any department, bureau, commission, board, council, or political subdivision of the state of Montana, except an entity that is a cemetery board or has authority over a cemetery.

(2) "Board" means the burial preservation board established in 22-3-804.

(3) "Burial site" has the meaning provided in 22-3-803.

(4) "Claimant" means a claimant for repatriation under 22-3-912 and includes a tribal group, lineal descendant, or next of kin.

(5) "Control" means having a legal interest in human skeletal remains or funerary objects sufficient to lawfully permit an agency or museum to treat the object as part of its collection for purposes of this part whether or not the human skeletal remains or funerary objects are in the physical custody of the agency or museum.

(6) "Cultural affiliation" means the existence of a shared group identity that can reasonably be traced historically or anthropologically between a tribal group and an identifiable earlier tribe. It may also include a shared identity that can reasonably be traced historically between an individual and an identifiable individual lineal descendant or next of kin.

(7) "Funerary objects" means objects that, as part of a death rite or ceremony, are reasonably believed to have been placed with human skeletal remains at a specific burial site either at the time of death or later and which human skeletal remains are currently in the possession or control of an agency, museum, or person, either along with the human skeletal remains or that can be identified by a preponderance of the evidence to be related to specific known human skeletal remains not currently in the possession or control of the agency, museum, or person.

(8) "Human skeletal remains" has the meaning provided in 22-3-803.

(9) "Inventory" means an itemized list that summarizes the collection of human skeletal remains and funerary objects in the possession or control of an agency or museum.

(10) "Marked, unmarked, unrecorded, registered, or unregistered grave or burial ground" has the meaning provided in 22-3-803.

(11) "Museum" means an entity or state or local government agency, including an educational institution, that receives state funding.

(12) "Person" includes a corporation, partnership, joint venture, estate, and any other legal entity, as well as a natural person.

(13) "Possessing entity" means an agency, museum, or person from whom repatriation is requested.

(14) (a) "Possession" means having physical custody of human skeletal remains or funerary objects with a sufficient legal interest to lawfully treat the human skeletal remains or funerary objects as part of a collection.

(b) The term does not include human skeletal remains or funerary objects on loan to an agency or museum.

(15) "Right of possession" means:

(a) possession obtained of nonculturally affiliated human skeletal remains or funerary objects; or

(b) possession obtained with the voluntary consent of a group or individual that had authority of alienation over the human skeletal remains or funerary object.

(16) "Tribal group" has the meaning provided in 22-3-803.

History: En. Sec. 3, Ch. 558, L. 2001.

22-3-904. Rules. The board shall adopt rules necessary to provide for filing of claims, procedures for hearings authorized under this part, and procedures for resolving multiple claims. Hearings may not occur until rules have been adopted. Rules must address, at a minimum, criteria for determining lineal descent, cultural affiliation, standards of evidence, and standards of proof.

History: En. Sec. 12, Ch. 558, L. 2001.

22-3-905 through 22-3-910 reserved.

22-3-911. Agency and museum inventory of human skeletal remains and funerary objects. (1) An agency or museum that on or after May 2, 2001, has possession or control over human skeletal remains or funerary objects shall within 6 months complete an inventory of all human skeletal remains and funerary objects and, to the extent possible based on all information possessed by the agency or museum:

(a) identify the circumstances surrounding the acquisition of the human skeletal remains or funerary objects, including any geographical information available pertaining to the original location of the human skeletal remains or funerary objects;

(b) list in the inventory the human skeletal remains or funerary objects that are clearly identifiable as to cultural affiliation; and

(c) list the human skeletal remains or funerary objects that are not clearly identifiable as to cultural affiliation.

(2) Within 3 months of completing the inventory, the agency or museum shall provide a copy of the inventory to:

(a) the board;

(b) the state historic preservation office; and

(c) each tribal government located in Montana.

(3) The agency, museum, board, or state historic preservation office shall provide a copy of an inventory list or a portion of a list to any other requesting party only after the agency, museum, board, or office, pursuant to Article II, section 9, of the Montana constitution, has balanced the public's right to the information and the individual privacy

interest associated with the information and has determined that the right of individual privacy does not clearly exceed the merits of public disclosure.

(4) Following completion of the initial inventory, each agency or museum shall, whenever the agency or museum receives new human skeletal remains or funerary objects through a loan or donation, update its inventory list within 6 months of the loan or donation. Upon completion, the agency or museum shall provide a copy of this update to the entities listed in subsection (2) within 3 months.

History: En. Sec. 4, Ch. 558, L. 2001.

22-3-912. Claims for repatriation. (1) A claim for repatriation of human skeletal remains or funerary objects must be made by:

(a) filing a written claim for the human skeletal remains or funerary objects with the board and the possessing entity having possession or control of the human skeletal remains or funerary objects; and

(b) proving, by a preponderance of the evidence:

(i) the claimant's cultural affiliation to the human skeletal remains or funerary objects; and

(ii) that the possessing entity does not have the right of possession.

(2) A claim for repatriation under this section may be made by a claimant:

(a) who claims cultural affiliation and requests the return of human skeletal remains or funerary objects listed in the inventory of an agency or museum; or

(b) who requests the repatriation of human skeletal remains or funerary objects that are not listed in the inventory of an agency or museum but are in the possession or control of the possessing entity.

History: En. Sec. 5, Ch. 558, L. 2001.

22-3-913. Hearing -- hearings examiner -- evidence -- study or testing order and costs -- findings. (1) The board shall appoint an attorney licensed to practice law in Montana as a hearings examiner to hold a hearing pursuant to Title 2, chapter 4, part 6, on a claim filed under 22-3-912. At a hearing under this section, the hearings examiner shall hear the evidence presented by each party, including evidence presented by a possessing entity or intervenor in support of a request for a temporary delay in repatriation made under 22-3-915.

(2) Either party or an intervenor may request and is responsible for the cost of genetic or other study or testing necessary to determine cultural affiliation. Upon such a request, the hearings examiner may order any study or testing necessary and may require a surety bond to ensure protection of human skeletal remains or funerary objects. The hearings examiner may grant the study or testing requested along with sufficient time to conduct the study or testing or may deny any study or testing requested upon a finding that the study or testing would not likely be pertinent to the determination of cultural affiliation.

(3) (a) If, based on a preponderance of the evidence, the hearings examiner finds that the claimant has a cultural affiliation with the human skeletal remains or funerary objects and that the possessing entity does not have the right of possession, the hearings examiner shall recommend to the board that the board order repatriation under 22-3-916. If the hearings examiner finds that there is a need to temporarily delay repatriation based

on an ongoing scientific study or a good faith effort toward scientific study under 22-3-915, the hearings examiner shall recommend a delay as provided in 22-3-915.

(b) If, based on a preponderance of the evidence, the hearings examiner finds that the claimant has not proven that the claimant has a cultural affiliation with the human skeletal remains or funerary objects and that the possessing entity has the right of possession, the hearings examiner shall recommend to the board that the board deny the claimant's request for repatriation and shall recommend that the board order that the possessing entity be granted uncontested control and possession of the human skeletal remains or funerary objects under 22-3-916.

(c) A recommendation under this subsection (3) shall be made in the form of a proposal for decision as provided in 2-4-621. The provisions of 2-4-621 apply to a recommendation made under this subsection (3).

(4) If the hearings examiner recommends repatriation, the hearings examiner shall issue an order requiring the possessing entity to consult with the claimant to arrange for the expeditious repatriation of the culturally affiliated human skeletal remains or funerary objects to the claimant, upon order of the board under 22-3-916.

History: En. Sec. 6, Ch. 558, L. 2001.

22-3-914. Closure of hearings. To the extent allowed by Montana law, the board shall, upon the request of either party or an intervenor, close any part of a board hearing or any part of a hearing under 22-3-913 to the public if the board finds that information required at the hearing may include identification of the specific location of a burial site that may lead to compromise of a burial site, human skeletal remains, or funerary objects or that information necessary for a determination regarding repatriation may compromise or interfere with any religious practice or custom.

History: En. Sec. 11, Ch. 558, L. 2001.

22-3-915. Delay of repatriation for scientific study. (1) If repatriation is ordered after a hearing, a possessing entity may request a temporary delay in repatriation because of:

(a) scientific study being conducted on or proposed to be conducted on human skeletal remains or funerary objects in its possession or control; or

(b) good faith efforts to initiate or proceed with a scientific study of human skeletal remains or funerary objects in its possession or control.

(2) If a hearings examiner determines that a possessing entity has provided evidence supporting a good faith effort regarding scientific study, the hearings examiner shall provide a reasonable period of delay to allow completion of the study prior to repatriation.

History: En. Sec. 7, Ch. 558, L. 2001.

22-3-916. Board decision -- order -- immunity against aggrieved parties -- relinquishment of control by tribal group. (1) Subject to the provisions of 2-4-621 and 2-4-623, at the conclusion of the hearing and upon receipt of the recommendations of the hearings examiner, the board shall:

(a) issue findings of facts and conclusions related to any decision regarding its determination supporting or denying a claimant's written request for the repatriation of human skeletal remains or funerary objects;

(b) issue findings of facts and conclusions related to any decision regarding a possessing entity's or intervenor's request for a temporary delay in repatriation pending completion of ongoing scientific study; and

(c) provide the claimant, respondent, possessing entity, or intervenor with a written copy of its findings and conclusions regarding the specific repatriation request.

(2) A possessing entity that repatriates culturally affiliated human skeletal remains or funerary objects in good faith pursuant to this section is not liable for claims by an aggrieved party or for claims of breach of a fiduciary duty or the public trust or of violation of state law that are inconsistent with this part.

(3) This section does not prevent the governing body of a tribal group from expressly relinquishing control over any human skeletal remains or control or title to any funerary object. The acquisition of a funerary object from a tribal group or individual with the voluntary consent of the tribal group or individual with authority to alienate the object constitutes the right of possession over that object. Divestiture of culturally affiliated human skeletal remains or funerary objects from a person without a right of possession does not constitute an unconstitutional taking of property.

History: En. Sec. 8, Ch. 558, L. 2001.

22-3-917. Appeals -- stay of order pending appeal -- court costs and attorney fees. (1) Within 30 days of a board decision regarding human skeletal remains or a funerary object located within the jurisdiction of the state, either party may file an appeal in the district court in the county in which the subject of the dispute is located. The court may include a grant of attorney fees to the prevailing party when it would serve the interests of justice. The court shall grant an award of costs to the prevailing party. An appeal under this section is subject to the provisions of Title 2, chapter 4, part 7.

(2) The filing of an appeal by either party automatically stays a board order on repatriation of human skeletal remains or funerary objects.

(3) A protection order issued by the board remains in effect until the issue is finally resolved by a state court.

History: En. Sec. 9, Ch. 558, L. 2001.

22-3-918. Multiple claims -- care and handling of human skeletal remains or funerary objects pending disposition. If multiple requests for repatriation of human skeletal remains or funerary objects occur and the appropriate claimant cannot be determined, the board shall provide for the appropriate care and handling of the human skeletal remains or funerary objects until:

(1) the requesting parties agree upon the disposition;

(2) the dispute is resolved by the board pursuant to 22-3-916; or

(3) the issue is finally resolved in a state court of competent jurisdiction.

History: En. Sec. 10, Ch. 558, L. 2001.

22-3-919 and **22-3-920** reserved.

22-3-921. Exclusions. The provisions of this part do not apply to any lithic material or other artifacts of nonhuman derivation removed from the Anzick site (known as Montana historical site No. 24PA506) on or before July 1, 1991, regardless of where

the material or artifacts are located or by whom the material or artifacts are controlled or possessed.

History: En. Sec. 13, Ch. 558, L. 2001.